Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

TIMOTHY MADAI TAYLOR,

Petitioner,

v.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 1991 Civil Rights Act (42 U.S.C. §2000e-2k(1)(A)(B)(C)) superseded the statistical proof requirements, burden of proof allocation, and business justification defense in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), requiring a reversal of Iowa's state courts on these issues in Petitioner's race discrimination, disparate impact claim.

2. Whether the State's subjective criteria, variable hiring practices, and unsupported conclusion of "best qualified", are insufficient to rebut Petitioner's prima facie case of race discrimination under a combined disparate impact and disparate treatment theory.

3. Whether Petitioner demonstrated that the State's alternative employment practice was simply to follow its own equal employment opportunity hiring policies and procedures set forth in the State hiring manual in support of his disparate impact claim under 42 U.S.C. §2000e-2(k)(1)(A)(ii) (1991) and Iowa Code §216.6.

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OPINIONS BELOW

The Iowa Supreme Court issued it final opinion by denying further review of the Iowa Court of Appeals decision on October 29, 1999, a copy appearing in the Appendix at page 20a. The October 29, 1999, decision has not been reported.

The Iowa Court of Appeals issued its opinion on August 27, 1999, a copy appearing in the Appendix at page 1a. The opinion has not yet been reported.

The Iowa District Court issued its opinion after a bench trial in this case December 15, 1997, a copy appearing at page 11a of the Appendix. The opinion has not been reported.

JURISDICTION

The judgment of the Iowa Court of Appeals was entered on August 27, 1999, deciding important questions of federal law. A timely Application for Further Review at Appendix 21a was filed September 15, 1999, and the Iowa Supreme Court denied the Application for Further Review (App. 20a) on October 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a)(1988) and S. Ct. Rule 10(c).

CONSTITUTIONS AND STATUTES INVOLVED

This case involves the following federal and state civil rights statutes: 42 U.S.C. §2000e-2k(1)(A)(B)(C) (1991):

(k) Burden of Proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law

> as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

Iowa Code §216.6 (1993):

> Section 1. It shall be an unfair or discriminatory practice for any:
>
> a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation. If a person with a disability is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

STATEMENT OF THE CASE

Petitioner (hereinafter "Madai") is an African-American who applied four different times for a job with the Iowa Department of Correctional Services in Fort Dodge, (which serves the multi-county Second Judicial District) in north central Iowa. From April through October, 1993, Madai applied for three different probation and parole officer (hereinafter "PPO") positions, and one residential advisor (RA) position. Each time, the all white supervisors deviated from established state hiring policies and rejected Madai, in favor of promoting members of the all

white Fort Dodge office staff. The State asserted a business "justification" hiring the "best qualified" applicant, having "community-based corrections experience" and on the job training. After exhausting his administrative remedies before the Iowa Civil Rights Commission and EEOC, Madai filed suit under a combined disparate treatment and disparate impact theory of race discrimination in hiring under Iowa Code §216.6, the state law counterpart to Title VII (42 U.S.C. §2000e (1991). Iowa courts use federal cases as the analytical framework for Iowa Code Chapter 216.

During a three-day bench trial, Madai challenged the State's entire decision-making process and deviations from the State's written hiring policies, including the State's preference (based on subjective criteria) for promoting its all white staff in Fort Dodge; the State's alleged business justification of hiring the "best qualified" without having conducted any investigation or having a factual basis from which to make a comparison; and the statistical disparity between the available 3.5% minority professional labor force and the 0.83% level of minorities employed in the Second Judicial District. The State admitted it failed to keep any statistics on minority applicants and each employment practice. The State offered no justification for deviating from its "equal employment opportunity" hiring policies. It defended its selections.

Madai challenged the State's "entire decision-making process" as follows: 1) The State failed to advertise all open positions as state policy required. At trial, Madai learned of additional open probation officer positions in 1993, filled by white staff, including the entry level PPOI position. The white office supervisor (Forbes) claimed the

PPOI position had been eliminated, but a former white job developer testified she was promoted to the position in 1993, despite the fact she had been fired from her prior job in a bank. The same year she was promoted again to PPOII. But for Madai's initial interview in July, 1993, the State set him up to compete against an experienced white PPOI for the top PPOIII position.

2) The State's hiring manual provided that initial applications for any position be by letter or resume. Madai submitted four letters and four resumes, which included five references. Forbes denied Madai an initial interview in April by letter, telling Madai his application would be maintained for six months. The hiring manual required maintenance of applications for one year after receipt, and further required ***all*** applicants who appear for interview shall be required to complete the Department's application form. No white staff completed any application form. Madai was subsequently selected as one of a handful of applicants to interview for PPOIII (Aug.), PPOII (Sept.), and RA (Oct.). Madai completed and signed an application form when interviewed for the PPOIII and PPOII positions. The trial judge concluded Madai failed to turn in an application form for the RA position, which was "justification" for the State's rejection of Madai in October. None of the whites promoted to each position from within the office completed any application form. The less qualified white staff member who was promoted to RA in October, 1993, was not required to complete any form, but Madai was denied the job for that reason. (App. 16a, 17a)

3) The State's hiring manual required Forbes to screen all applications and select at least five for interview, as well as the use of standardized minimum qualifications and the use of consistent interview guide question forms by a team of interviewers. Forbes, however, developed on his own, a screening criteria form on which he crossed out for consideration Madai's community-based corrections-related experience. The form was not used at all to screen white staff to determine who was interviewed; it was applied to outside applicants only. The form was offered to illustrate the use of subjective criteria.

The State manual recognized an applicant's disqualification for "false information" during the application process, and for prior dismissal from department employment, but the written policies specifically required the hiring supervisor to document any such finding or attach a written note to the application stating the reason for disqualification and the source of information relied on. When Forbes and the Assistant Director initially interviewed Madai, both white men testified at trial they believed Madai was "dishonest" for telling them he had been a "probation officer" at a regional prison. The State produced *no* documentation. Madai denied any dishonesty and reflected his true job title of "correctional officer/counselor" on each of his four resumes. Curiously, Forbes continued to select Madai to interview for two subsequent open positions. Forbes admitted he never investigated Madai's employment history or background, always assuming Madai was never the top candidate. Although State hiring policies required the use of standardized interview question guide forms, the two white

supervisors asked Madai during his first interview if he could discipline black clients. At trial, they admitted not asking any white applicants a similar question. During Madai's second interview, one white interviewer (Meine) wrote in his own handwriting at the end of his interview question guide: "weakness" and below that word, the interviewer listed Madai's race "African American ___?___ team worker."

4) The State's hiring manual directed that an adequate number of references "shall be contacted for information on the candidates," after interviews are completed. When checking references, the interviewers were required to document their findings with a check form. Under the same policy, the hiring supervisor was required to contact at least "two recent references of the candidates and obtain the information necessary to complete the reference check form." Forbes admitted never checking any of Madai's references in 1993; no such supporting documentation was offered on any candidate, from which the white decision-makers could make any comparison to determine who was "best qualified."

After reference checks, the State manual directed that a selection of "the most qualified applicant was to be chosen for the position, consistent with EEOC guidelines and without regard to any non-merit factors," as listed in the State's Affirmative Action Plan.

But Forbes ignored Madai's community-based corrections experience before 1990, as a substance abuse counselor in the Fort Dodge Correctional Services office, as well as Madai's counseling work, corrections experience, a Bachelor's Degree in social work, and an extensive list

of community accomplishments in crime prevention and the rehabilitation of young African Americans released from locked facilities in Fort Dodge. Every witness on Defendant's staff who testified, denied having had any prior "community-based corrections experience", and many never served as RA's, when originally hired, including Forbes (App. 266, 292), McCarville (App. 42), Carse (App. 72), Meine (App. 253), Hall (App. 215), Wozinak (App. 36), and Stokesbury (App. 63-64, 67). Meine co-interviewed Madai for a PPOII position, and Hall was the supervisor of the RA facility, who co-interviewed Madai for the RA position with Forbes; all were white. Like Madai, Forbes had been a substance abuse counselor before joining the department.

Forbes' predecessors before 1990, Wozniak and Stokesbury, together with PPOII Steve Carse refuted Forbes' claim that RA's had significant counseling responsibilities, denied RA's on staff were any more qualified to be a PPO, and confirmed that the job description for RA was primarily monitoring behavior in the local residential facility (jail). Madai showed he had comparable RA experience as a correctional officer in a prison for over three years, while completing his social work degree. Stokesbury considers Madai's correction experience more extensive than an RA's. Forbes admitted his own prior substance abuse counseling experience was comparable to having CBC experience. However, Madai's substance abuse counseling was assigned less value, because it was somehow not the same as "direct" "community-based corrections experience."

Stokesbury testified that he followed the State's hiring manual policies and procedures before 1990, by conducting reference checks, posting and advertising all open positions, using minimum qualifications for each position, avoiding preferential treatment for white staff with community-based corrections experience, keeping applications on file, and not requiring more qualifications or procedures for outside applicants than in-house applicants. Stokesbury testified that under those circumstances, the State had hired minority probation/parole officers before 1990 when he was office supervisor. Forbes admitted that if he followed the State's hiring manual as written, he would be providing equal employment opportunity to all applicants. Forbes admitted that if he did not follow the written policies, it was possible he was not treating applicants the same, and the purpose of the policies was to avoid favoritism.

Madai challenged the State's business "justification" for promoting white staff by presenting proof of the necessity for hiring qualified minorities. In February, 1993, the Iowa Supreme Court's "Equality in the Courts" Task Force report recommended the hiring of more minorities to address the serious over-representation of African Americans in Iowa's prison population, due in part to few minorities being employed in the criminal justice system. The task force concluded its report recommending an increase in employment opportunities for minorities at critical points. At the time, the State had the fifth highest rate of incarceration of African Americans in the U.S. African Americans made up 1.6% of the state population and 22% of the prison population. According to 1994 revocation rates in the Second Judicial District,

the recidivism rate of blacks was nearly twice that of Caucasians, 16.67% versus 9.93%.

In a follow-up report of December, 1996, the Iowa Supreme Court's Task Force for "Equality in the Courts" reported that only two judicial districts in Iowa had moved forward from the 1993 recommendations. The task force noted that the Second Judicial District Department of Correctional Services had the lowest minority employment rate of any judicial district at 1.7% in 1996. The task force recommended greater emphasis on equal employment opportunities and affirmative action, and the use of non-discriminatory interview selection guides.

To establish a statistically significant racial disparity caused by the State's decision-making process in 1993, Madai relied on the State's Affirmative Action Plan of 1993. The Plan recognized the availability of a 3.5% professional minority labor force in the Second Judicial District in 1993, and a significant underutilization of minorities in all positions by the Second Judicial District. The Assistant Director of Correctional Services, Robert Borst, admitted at trial he believed the Second Judicial District employed "enough minorities" in 1993, when it employed one minority employee (1 Asian jailer in Ames, Iowa) out of a district total of 120, or 8/10 of 1% of its district-wide work force. The 0.83% minority employment rate also represented the limited number of minority employees (1) in the Second Judicial District with community-based corrections experience for promotion within the district. The Fort Dodge office employed no minorities or 0%.

According to Madai's expert witness on education administration and social service, Pat Avery, the effect of the State's hiring practices in the Second Judicial District in 1993 (including preferences for white staff with CBC experience, use of subjective screening criteria, the exclusion of non-corrections community involvement as a factor, the elimination of the PPOI position for outside applicants and the discretionary use of application forms, interview guides, and reference checks for outside applicants) was to under-employ a significant professional minority labor force in Fort Dodge and in the Second Judicial District from 1990-1995 and to perpetuate the institutional racism identified in the Iowa Supreme Court's "Equality in the Courts Task Force Report," resulting in the over-representation of African Americans in corrections in Iowa.

When Federal Questions Raised

At the conclusion of the bench trial and in lieu of closing arguments, counsel for each party submitted trial briefs. Madai's trial brief asserted that: 1) The State's Affirmative Action Plan established the requisite statistical racial disparity sufficient to establish an inference that the State's decision-making process caused disparate impact based on race; 2) The State had the burden of proof to establish a business "necessity" for its numerous deviations from the State's equal employment opportunity hiring policies and that its reasons were not a pretext for racism and disparate treatment; 3) Madai demonstrated the State's alternative hiring practices were to follow its own policy manual in order to provide equal employment opportunity; and 4) The State's requirement

of a duplicate application from Madai for the RA position and use of subjective criteria by all white decision-makers supported a disparate treatment and disparate impact theory of recovery. (Trial Brief; pp. 5-8, 10-16) Each of these issues was presented on appeal to the Iowa Court of Appeals in Madai's briefs (Brief pp. 8-15, 18-22, 23-25) (Reply Br. 207, 8-11) and Application for Further Review to the Iowa S. Ct. (App. 21a-23a)

The trial court dismissed Madai's disparate impact claim, concluding Madai failed to prove the State's hiring practices excluded a disproportionate number of a protected class or that the challenged practices do not serve the legitimate employment goals of the State. Relying on *Wards Cove Packing Co. v. Atonio*, L.Ed. at 751, the trial judge concluded Madai could not rely on statistical disparities in an employer's work force to establish a causal relation between the challenged practices and the statistical disparity. (App. 18a) The trial judge concluded Madai established a prima facie case of disparate treatment under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). But the trial court accepted the State's rationale that it hired "more qualified" white in-house applicants with "community-based corrections experience" which Plaintiff did not have, and concluded the State's rejection of Madai "was based on a legitimate, non-discriminatory reason." (App. 17a) The Court also concluded Madai removed himself from consideration for the RA position by failing to complete a job application form for that position.

Madai filed a timely Notice of Appeal on January 12, 1998, asserting he had established a disparate impact claim with sufficient statistical proof and the State had

not met its burden under either theory. The Iowa Court of Appeals affirmed, rejecting Madai's argument that the State's subjective criteria and variable hiring practices had a disproportionate impact on people of color. The Court of Appeals rejected the contention the RA application was a pretextual excuse for not hiring Madai and concluded the State met its burden of production establishing that its hiring practices served legitimate employment goals but that Madai failed to persuade the fact finder the State's "practices do not serve legitimate goals." (App. 6a, 7a, 9a) The appellate court rejected Madai's argument that all white decision-makers' preference for all white staff with "CBC experience" constituted impermissible subjective criteria and required Madai to prove that the State's variable hiring practices applicable to outsiders versus insiders did not serve "legitimate goals," relying on *Wards Cove Packing Co. v. Atonio.* (App. 7a, 9a, 10a)

In its final analysis, the Court of Appeals concluded Madai had not raised the issue of "alternative hiring practices." (App. 10a) However, both Madai's trial and appellate briefs delineated how the State's actual practices differed from its written policies at each stage of the decision-making process. Madai outlined the State's written policies as its alternative to the State's subjective criteria and variable practices to reduce disparate impact by race.

On September 15, 1999, Madai filed an Application for Further Review with the Iowa Supreme Court on each of these issues. (App. 21a, 22a) On October 29, 1999, the Iowa Supreme Court denied further review. (App. 20a)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Iowa Supreme Court erroneously affirmed the Iowa Court of Appeals acceptance of the State's business justification under *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), ignoring the 1991 amendments to Title VII, concerning statistical proof, burden of proof, and affirmative defenses in this combined disparate impact and disparate treatment case, involving race discrimination in hiring by the State of Iowa. The highest state courts interpreted the State's civil rights statute based on a faulty analysis of federal law and reliance on *Wards Cove*. The Iowa courts allowed the State, as a hiring employer, to rely on subjective criteria by all white decision-makers and to engage in variable hiring procedures, in rejecting a well-qualified African American applicant for several open probation and parole office positions on 4 different occasions in 1993, in favor of all white staff members for each position. The State's business justification was the white staff were "best qualified," although the State performed no investigation of Madai's qualifications or references from which to make a comparison and used his race as a basis for determining he was not a top candidate.

Madai established a prima facie case of race discrimination in hiring under both a disparate impact theory and disparate treatment under Iowa Code §216.6, as interpreted by federal law, by relying in part on the statistical disparities in the state's Affirmative Action Plan. No other statistics were available from any other source on the impact of the State's practices. That plan showed the State employed only one minority (an Asian jailer (RA) in

the Ames office) out of a district total of 120 employees, or 0.83% minority employees. The rest were white. The plan also identified the availability of a 3.5% professional minority labor pool in the Second Judicial District, consisting of several counties in north central Iowa, in which the Fort Dodge correctional service office employed all whites or 0% minorities. The State's 1993 plan acknowledged a statistically significant underutilization of minorities in all job categories and the need to hire qualified minorities.

Given the significant statistical disparity between the available professional minority work force, the all white Fort Dodge staff and predominantly white district staff, Madai showed that the Fort Dodge office supervisor (Forbes) since 1990 never hired any minority employee, while deviating from state hiring policies and procedures. In contrast, two former Fort Dodge office supervisors had followed the state hiring manual policies before 1990, and in so doing, the state had employed a minority probation and parole officer before 1990.

The State courts upheld the State's reliance on subjective criteria by all white decision makers and its selection of "best qualified" as its "business justification" for promoting only white staff for each open position in Fort Dodge, while the State deviated consistently from the State's hiring manual procedures when rejecting Madai for employment four times. Subjective criteria, included the State's preference for white staff as "best qualified" with "community-based corrections experience," the absence of any investigation of Madai's qualifications and background, questions relating to Madai's race and his ability to work in the office, the assumption Madai was

not a top candidate, and the imposition of greater application requirements or hurdles for outside applicants including Madai.

Although it was the State's burden to rebut Madai's prima facie disparate impact claim with a showing of business necessity for deviating from the State's hiring policies that was job-related, the state offered nothing. Madai established that the State had a compelling "business necessity" for hiring a qualified minority probation and parole officer in Fort Dodge, due to the significant over-representation of African Americans in the State's correctional system, various state studies recommending the hiring of qualified minority personnel to address institutional racism and the over-representation issue, and the nearly double recidivism rate of African Americans versus whites in the Second District.

Madai further demonstrated that the State's alternative employment practice was simply to follow its own hiring procedures and policies, on a consistent basis for both inside staff and outside applicants, as set forth in the State's hiring manual, including advertising open positions, use of objective job qualifications and interview guide questions, consistent screening and application tools, and reference checks.

STATISTICAL PROOF SUPPORTING DISPARATE IMPACT CLAIM

This Court has held the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in

the relevant labor market. *Hazelwood School District v. U.S.*, 433 U.S. 299, 308 (1977); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-655 (1989). In this case, the State employed 100% whites at all levels in the Fort Dodge office, and no minorities after 1990, while a 3.5% professional minority labor force was available in the Second District in 1993 and a 0.83% minority staff was available in the Second Judicial District Department. Considering only the available correctional service staff with "community-based corrections experience" in the Second District, the State employed 1 minority out of 120, or 0.83% versus a 3.5 % professional minority labor force in the District.

The Eighth Circuit Court of Appeals has held that if the difference between the expected number of minorities and the observed number is greater than two or three standard deviations, the statistical disparities are significant, permitting an inference of racial imbalance. *Emmanuel v. Marsh*, 897 F.2d 1435, 1441 (8th Cir. 1990). Where promotions are made from within, the essential question is whether discrimination impairs black employees' attempts to rise from non-supervisory to supervisory positions. *Emmanuel*, at 1440. In this case, there was one minority RA (in Ames) within the entire Second Judicial District having community-based correctional experience. He was not promoted to any of the Fort Dodge positions.

The State's assertion of having previously employed some black probation and parole officers at an unspecified time in the past failed to rebut disparities in 1993. *Emmanuel*, at 17. However, the trial judge erroneously concluded Madai did not prove causation citing

Wards Cove. This Court, however, has held that substantial disparities raise the inference of causation.

> Our formulations which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise an inference of causation. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 101 L.Ed.2d at 845 (1988).

In this case, however, Madai established causation with statistical disparities and the testimony of former office supervisors who *had followed* the state hiring policies and who *had hired* an African American probation officer before 1990.

EMPLOYER'S BURDEN OF PROOF

The State courts upheld the State's business justification for racial disparities. The State claimed it hired the "best qualified" applicants, having "community-based corrections experience" and on the job training. The State offered no specific justification for its deviations from the State hiring manual procedures. The State's business justification for the discriminatory process it employed was simply: the ends justify the means, without any investigation or documentation of Madai's qualifications or disqualifications, as a basis for comparison.

This Court has long held that business "necessity" is the touchstone for the validity of employment practices under Title VII of the Civil Rights Act (42 U.S.C. 2000e et seq.), requiring equal employment opportunities. "If an

employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Under Title VII of the Civil Rights Act, the employer had the burden of showing that any given requirement has a manifest relationship to the employment in question. *Griggs*, p. 432. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* Under the *Griggs* standard, the burden is on the defendant employer to prove both a "compelling need" for the challenged policy, and the lack of an effective alternative policy that would not produce disparate impact. *Davey v. City of Omaha*, 107 F.3d 587, 590 (8th Cir. 1997). In this case, the State failed to show any need for a duplicate application form from Madai for the RA position. *Taylor v. State of Iowa*, No. 9-127-98-0089 slip op. (Iowa Ct. of App. 8/27/99). (App. 9a) The white person hired did not complete any form. The State already had a form from Madai on file from a previous job application.

Disparate impact analysis may be applied to allegedly discriminatory or discretionary employment practices *Watson*, 989-991. The 1991 Civil Rights Act overturned *Wards Cove* and placed the burden of production and persuasion on the employer to demonstrate that the challenged practice or the entire "decision-making process" is job-related and consistent with business necessity. 29 U.S.C. §2000e-2(k)(1)(A)(i) (1991); *Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs*, at 431. There is an obvious and significant difference in the plain meaning of the two phrases . . . "business necessity versus business

justification." *Houghton v. Sipco*, 38 F.3d 953, 959 (8th Cir. 1994); *Allen v. Seidman*, 881 F.2d 375, 377 (7th Cir. 1989).

In this case, Madai demonstrated that alternative hiring practices were set forth in the State's hiring manual, including advertising open positions, using standard screening criteria, interview questions, and application requirements for all applicants, and checking and documenting references. The State did not explain why it did not follow its own hiring manual policies. The State did not offer either a business necessity or a justification (relating to the job) for deviating from the State hiring policies. The State had the burden of proving why it did not use the alternatives set forth in its own written hiring policies.

The problem with this Court's pre-*Wards Cove* decisions is that this Court was not consistent in articulating a substantive standard of business necessity. See Robert Belton, "The Unfinished Agenda of the Civil Rights Act of 1991," 45 Rutgers L. Rev. 921 (1993). The Iowa appellate courts relied on *Wards Cove* and affirmed the State's business "justification" that the State's selections furthered the employment goal of hiring the "best qualified." The stated goal articulates a conclusion implying a fair comparison was made, but none occurred without a comparative process. Under *Wards Cove*, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Wards Cove*, at 659. But there is such a requirement under 42 U.S.C. §2000e et seq. (1991).

Subjective criteria and practices employed by all white decision-making are inherently suspect and are

insufficient to rebut a prima facie showing of disparate impact or disparate treatment. *Watson v. State of Miss.*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*. Subjective criteria provides convenient pretext for discriminatory practices, and particularly in lower echelon employment levels, subjective job criteria should be viewed with much skepticism. *Nanly v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981).

For purposes of alleging an unlawful discrimination, the refusal to hire a job applicant for failing to meet all of the requirements is not justifiable, if the white persons hired failed to meet the same requirements. *U.S. v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979). In this case, Madai was not hired for the last RA position, because he did not complete a duplicate application form. A less qualified white, part-time RA was promoted to the position, although she did not complete any new application form. These facts do not support any of the standards, whatever they are, which are imposed on the employer. The state failed to meet its burden of proving a job-related business necessity.

CONCLUSION

Petitioner prays that a Writ of Certiorari issue from this honorable Court to review the final judgment of the Iowa Supreme Court affirming the decision of the Iowa Court of Appeals which turns on a federal question. (App. 1a, 2a). In the event the Petition is granted, Petitioner prays that the judgment of the state courts be reversed, that the cause be remanded with instructions to enter judgment in favor of Petitioner and to determine

damages and award attorney fees and costs, and for such further relief as the Court deems just.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF IOWA

No. 9-157/98-0089
Filed August 27, 1999

Timothy Madai Taylor,

Appellant,

vs.

State of Iowa,

Appellee.

Appeal from the Iowa District Court
for Webster County,
Kurt L. Wilke, Judge

Plaintiff appeals the court's decision; following a bench trial, in favor of the defendant, the Iowa Department of Correctional Services and Department of Corrections. **AFFIRMED.**

Jeane W. Pearson of Price & Pearson, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, and R. Andrew Humphrey, Assistant Attorney General, for appellee.

Heard by Huitink, P.J., and Streit and Zimmer, JJ. Vogel, J., takes no part.

ZIMMER, J.

Timothy Madai Taylor appeals the trial court's decision in favor of the Iowa Department of Correctional Services and Department of Corrections, holding that he could not recover on his state civil rights claim alleging discrimination on account of his race. We affirm.

I. Background Facts and Proceedings. In 1993 Taylor, a forty-two year old African American, submitted applications four times for various positions with the Second Judicial District Department of Correctional Services ("Department"). In April 1993, Taylor applied for a position as a PPO II (probation and parole officer level II). There were one hundred sixty-one applicants for that position. The Department interviewed the top five applicants. Taylor was not interviewed. In August 1993, Taylor applied for a position as a PPO III. He was interviewed, but was not hired. In September 1993, Taylor applied for another PPO II position. He was interviewed, but was not hired. In October 1993, he applied for a position as a Residential Assistant (RA) for the Fort Dodge Residential Correctional Facility. He was again interviewed, but was not hired.

On September 5, 1995, Taylor filed a petition charging the Department with discrimination in hiring in violation of Iowa Code §216.6 (1993), alleging both disparate treatment and disparate impact. Following a bench trial the court ruled in favor of the Department. It found Taylor had been rejected for legitimate, nondiscriminatory reasons, in particular that other applicants for the same positions were more qualified. It also found Taylor had removed himself from consideration for a fourth position by failing to complete the application process.

The court dismissed Taylor's claim of disparate treatment.

The court also dismissed Taylor's claim of disparate impact. It concluded that although Taylor offered statistical evidence showing few minorities in the Department's workforce, such evidence did not alone prove the Department's hiring practices caused disparate impact. It found Taylor had not shown a causal relationship between the challenged practices of the Department and the alleged statistical disparities in the Department's work force. Further, the court did not find the challenged hiring practices did not serve in a significant way the legitimate employment goals of the Department.

Taylor now appeals. He contends the district court improperly considered his failure to complete the RA application process in dismissing his disparate treatment claim. He also alleges the district court failed to fully consider his disparate treatment claim pursuant to the analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, L. Ed. 2d 668 (1973). He finally contends the district court erred in dismissing his disparate impact claim.

II. Scope of Review. Our review of discrimination claims tried to the court is at law. *See* Iowa R. App. P. 4; *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). We are not bound by the trial court's application of legal principles or conclusions of law. *See Fuller v. Iowa Dep't of Human Serv.*, 576 N.W.2d 324, 328 (Iowa 1998).

The trial court's findings of fact have the effect of a special verdict and are binding on us if supported by substantial evidence. *See* Iowa R. App. P. 14(f)(1); *Reiss v.*

ICI Seeds, Inc., 548 N.W.2d 170, 173 (Iowa App. 1996). We are prohibited from weighing the evidence or the credibility of the witnesses. *See Reiss v. ICI Seeds, Inc.*, 548 N.W.2d at 173. We construe the trial court's findings broadly and liberally; and in the event of doubt or ambiguity about those findings, we construe them to uphold rather than defeat the trial court's judgment. *Id.* Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings. *Id.* Evidence is not insubstantial merely because it could support contrary inferences. *Id.*

III. Employment Discrimination Theories. Taylor bases his employment hiring discrimination claims on Iowa Code chapter 216, our state law counterpart to Title VII (42 U.S.C. §2000e) under federal law. Taylor alleges disparate treatment and disparate impact theories of employment discrimination.

Disparate treatment cases involve discrimination addressed to persons on the basis of race, color, religion, etc.; disparate impact cases involve employment practices neutral on their face but which nevertheless result in discrimination. *See Clark-Peterson Co., Inc. v. Independent Ins. Assocs., Ltd.*, 492 N.W.2d 675, 679 n.7 (Iowa 1992); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 516 (Iowa 1990). "In short, the disparate treatment theory focuses on the employer's motivation" while "the disparate impact theory focuses on the consequences of the employer's conduct." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 516.

A. Disparate Treatment. We follow the Title VII analytical framework developed in *McDonnell Douglas v.*

Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) for allocating the burden and order of presentation of proof under Iowa Code chapter 216. *See, e.g., Bd. of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252 (Iowa 1998); *Seivers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633 (Iowa 1998); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512 (Iowa 1990); *Hamilton v. First Baptist Elderly Hous. Found.*, 436 N.W.2d 336 (Iowa 1989).

Under *McDonnell Douglas* and its progeny, the complainant must first establish a prima facie case on intentional discrimination by a preponderance of the evidence. *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 516. Once the prima facie case is established, a presumption arises the employer discriminated against the complainant. *See Hamilton v. First Baptist Elderly Hous. Found.*, 436 N.W.2d at 338.

Defendant must then articulate or otherwise produce evidence of a legitimate nondiscriminatory reason for not hiring plaintiff. *See Vaughn v. Must, Inc.*, 542 N.W.2d at 538; *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 517.

If the defendant succeeds in producing a legitimate nondiscriminatory explanation, the plaintiff must then prove the asserted reasons are pretextual, are not worthy of belief or that a discriminatory reason nevertheless more likely motivated the employer. *See Vaughn v. Must, Inc.*, 542 N.W.2d at 538; *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 517.

In all three stages the burden of persuasion rests with the employee. The only burden the employer shoulders is the burden of production of evidence to rebut the presumption of discrimination. *See Hamilton v. First Baptist Elderly Hous. Found.*, 436 N.W.2d at 338.

B. Disparate Impact. As with disparate treatment, our courts have used federal cases in analyzing disparate impact questions under Iowa Code chapter 261.

Disparate impact analysis involves three stages. The plaintiff must first establish a prima facie case of discrimination by showing "that a particular employment practice has an adverse impact on a protected group in 'marked disproportion to its impact on employees outside that group.' " *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 517. This stage depends almost entirely on statistical evidence. *See Dubuque City assessor's Office v. Dubuque Human Rights Comm'n*, 484 N.W.2d 200, 203. However, it is also incumbent upon the complainant to isolate and identify " 'the specific employment practices that are allegedly responsible for any observed statistical disparities.' " *Id.* (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 109 S. Ct. 2115, 2124, 104 L. Ed. 2d 733, 751 (1989)). There must be a showing of "causal link between the challenged employment practice and the disparate impact." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 518.

Once the prima facie case is established, the burden shifts to the employer to produce evidence that the challenged employment practice serves, in a significant way, a legitimate employment goal of the employer. *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at

519 (citing *Wards Cove Packing Co. v. Atonio*, 490 at 659-60, 109 S. Ct. at 2125-26, 104 L. Ed.2d at 752-53). However, it remains upon the plaintiff to disprove the employer's assertions. *See Wards Cove Packing Co. v. Atonio*, 490 at 659-60, 109 S. Ct. at 2126, 104 L. Ed. 2d at 752-53.

The complainant may still prevail even if he or she is unable to persuade the fact finder the employer did not have a business justification for its employment decision. "To prevail, the [complainant] must convince the fact finder that (1) the employer has alternative hiring practices that could reduce the disparate impact and (2) the employer refuses to adopt these alternatives." *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 519 (citing *Wards Cove Packing Co. v. Atonio*, 490 at 659-60, 109 S. Ct. at 2125-26, 104 L. Ed. 2d at 752-53).

The burden of persuasion in disparate impact cases rests with the complainant in all three stages of proof. *Id.*

IV. Merits of Disparate Treatment Claim. Taylor avers failure to apply for a job opening does not bar a Title VII disparate treatment plaintiff from establishing a prima facie case. *See generally EEOC v. Metal Service Co.*, 892 F.2d 341 (3rd Cir. 1990). However, the district court found, and the defendants do not dispute, that Taylor has established a prima facie case of disparate treatment discrimination. We need not further consider this matter.

Taylor next argues the district court erred in failing to consider the third prong of *McDonnell Douglas*. After concluding Taylor had presented a prima facie case, the district court stated:

> Here, the Defendants argue that Plaintiff's rejection for the PPO positions was due to more

> qualified applicants. This court agrees. . . . This court finds that Defendants' rejection of the Plaintiff for the PPO positions was based on a legitimate, nondiscriminatory reason.

If Taylor believed the district court failed to consider a legal issue properly presented to it, he should have afforded the district court an opportunity to address the alleged error through a rule 179(b) motion. This was not done. Taylor has therefore failed to preserve this matter for our review. *See Bellach v. IMT*, 573 N.W.2d 903, 904 (Iowa 1998); *Lawrence v. Grinde*, 534 N.W.2d 414, 418 (Iowa 1995) (holding when a case proceeds to a non-jury trial, the law requires a party to file a rule 179(b) motion requesting the trial court to enlarge or amend its findings in order to preserve an issue for appeal when the court fails to resolve an issue, claim, defense, or legal theory the parties have properly submitted to it for adjudication); *see also State v. Rosenstiel*, 473 N.W.2d 59, 61 (Iowa 1991) (holding "a party who fails to alert the district court to its contentions at trial cannot thereafter rely on those contentions to seek reversal on appeal"). The order of the district court dismissing Taylor's disparate treatment claim is therefore affirmed.

However, even if error had been preserved, Taylor would not prevail. Though the district court did not explicitly address the third element of *McDonnell Douglas*, we conclude the court did consider the matter. The court did not state the Department merely presented evidence of legitimate reasons for not hiring Taylor. Rather, it made a specific finding the Department actually had a legitimate reason for not hiring Taylor. The language of the court's order implies the court, as fact finder, did not

believe Taylor had proven the Department's legitimate, nondiscriminatory reasons for not hiring him were merely pretextual. Having carefully reviewed the record, we find the conclusion supported by the evidence. In particular, we reject his contention that his failure to complete the job application for the RA position was a pretextual excuse for not hiring him.

V. Merits of Disparate Impact Claim. Taylor argues the district court erred in dismissing his disparate impact claim on the basis he had failed to present a prima facie case of discrimination. That is, that the district court erred in concluding the hiring practices of the Department do not operate to exclude a disproportionate number of members of a protected class. He also alleges his claim should not have been dismissed on the basis that he failed to show the hiring practices do not serve legitimate employment goals of the department.

Even assuming the court erred in concluding Taylor had not presented a prima facie case, reversal is not required. Taylor claims the Department had the burden of proving its hiring practices served legitimate employment goals. However, the Department only had the burden of production, not persuasion. This burden of production was satisfied. The burden then shifted to Taylor to persuade the finder of fact that the Department's practices do not serve legitimate goals. The district court concluded Taylor had not met his burden of persuasion. Taylor has not directed this court to any evidence which discredits the district court's conclusion.

Assuming he made a prima facie case, having been unable to persuade the fact finder on the question of the

Department's business necessity defense would not have ended his case. He could still have prevailed if he proved the Department refused to adopt available alternative hiring practices that could reduce the disparate impact. However, Taylor apparently did not raise this argument to the district court and the court did not address the issue in its order. It is not alleged the district court erred in this respect.

Thus, even if the court erred in determining no prima facie case had been presented, its dismissal order must nevertheless be upheld (1) because plaintiff has failed to prove the Department's hiring practices do not serve legitimate goals and (2) because he has not proven the Department refused to adopt alternative hiring practices which could have reduced the alleged disparate impact. The order dismissing Taylor's disparate impact claim is therefore affirmed.

AFFIRMED.

Iowa District Court for Webster County

No. C4278-0995

Timothy Madai Taylor,

Plaintiff,

vs.

State of Iowa, ex rel., Iowa Department of Correctional Services and Department of Corrections,

Defendants.

ORDER

Filed December 15, 1997

The above-entitled matter was tried to the Court commencing September 16, 1997. The parties requested, and were given leave to file legal memorandums which were all finally submitted on October 6, 1997. The Plaintiff was represented by Ms. Jeane W. Pearson, attorney at law. The Defendants were represented by Mr. R. Andrew Humphrey, Assistant Attorney General.

Facts

Plaintiff brings this litigation claiming that he was the victim of racial discrimination in the hiring practices of the Defendants. The Plaintiff is a gentleman of African

heritage. He is forty-two years old, married and has five children. He obtained an Associate Arts degree in human services from Iowa Central Community College in 1987, and a Bachelor of Arts degree with emphasis in social work from Buena Vista College in 1989. His work experience includes summer youth director in 1984 and 1985, correctional officer at the North Central Correctional Facility in Rockwell City, Iowa, from 1985-1989, treatment counselor at North Central Alcoholism Research Foundation from 1989-1990, minority affairs counselor at Iowa Central Community College from 1991-1992, and family development specialist at Y.O.U.R., Inc., in Webster City. In addition to his education and employment experience, the Plaintiff has been involved in numerous civic endeavors including volunteer jail counselor, crime prevention efforts, community center projects, second chance mentoring program and others.

In 1993 Plaintiff applied four times for various positions with the Second Judicial District Department of Correctional Services (Department). On each occasion he was unsuccessful in securing employment.

In April 1993, Plaintiff applied for a position as a PPO II (probation and parole officer level II). There were one hundred sixty-one applications for that position. The Department interviewed who they considered were the top five or six applicants. Plaintiff was not interviewed.

In August 1993, Plaintiff applied for a position as a PPO III (probation and parole officer level III). He was one of the applicants who was chosen to be interviewed, but not hired.

In September 1993, Plaintiff applied for another open position as a PPO II. Again he was interviewed, but not hired.

In October 1993, Plaintiff applied for a position as an R.A. (Residential advisor) at the Fort Dodge Residential Correctional Facility. He was interviewed, but not considered for the job because the Department claims that Plaintiff failed to complete the application process.

Plaintiff is qualified for all of the positions for which he applied. Defendants make no contest in that regard. It is Defendants' position that better qualified applicants were hired for the PPO positions and that Plaintiff took himself out of consideration for the R.A. position.

The Department hired Mr. Russell Martin for the PPO II position in April 1993, and for the PPO III position in August 1993. Mr. Martin has a Bachelor of Science degree in criminal justice from Northeast Missouri State University in 1983. He has completed numerous training sessions in corrections, and he had seven years experience as an R.A. at the Fort Dodge Residential Correctional Facility, and two years experience as a PPO I (probation and parole officer level 1), with the Department.

The Department hired Mr. Russell Goebel for the PPO II position in September 1993. Mr. Goebel has an Associate Arts degree in criminal justice from Iowa Central Community College in 1987 and a Bachelor of Science degree in human services from Buena Vista College in 1990. He also had five years experience as an R.A. at the Fort Dodge Residential Correctional Facility.

Mr. Tom Forbes has been the supervisor of the parole and probation office in Fort Dodge since August 1990. He has nine probation and parole officers under his supervision. As supervisor he is directly involved in the hiring process. During his tenure four individuals have been hired as probation and parole officers. None are racial minorities, but two are women.

Mr. Forbes states that while it is not required that an applicant for a PPO position have community based corrections experience, it certainly is a plus. There are PPO's who were hired without such experience, but in Plaintiff's case, he was competing for a job with applicants who had, and he did not. Mr. Forbes states that he informed Plaintiff the best way to work into the system was to begin as an R.A. and do a good job. Both Mr. Martin and Mr. Goebel had years of R.A. experience before applying for a PPO position.

Plaintiff contends that when he was granted interviews for the various positions he did not perceive the interviewers as taking him seriously. He also believes that untruths were circulated within the Department which kept him from being seriously considered, and none of his references were checked which included a number of civic leaders.

Mr. Forbes stated that only references of the top candidate for the job after the interviews were checked. Mr. Wayne Meine, a PPO with the Department, stated that he participated in the interviews for the PPO II position in September 1993. In his opinion the Plaintiff was not in the top two of applicants for that job. In regard

to Plaintiff's claim of untruths circulating in the Department, there was some evidence of a rumor years before the Plaintiff was involved in drugs. There is no indication, however, that that rumor found its way to Mr. Forbes or that it had any bearing on Plaintiff not being hired.

Mr. Forbes did acknowledge that he knew that Plaintiff had been let go from his position at the North Central Alcoholism Research Foundation at the end of his job probationary period. Mr. Forbes states that he did not check into the reason for that separation and this Court is unsure as to what extent that knowledge may have had on the decision not to hire Plaintiff.

Mr. Robert Borst, Assistant Director of Community Based Corrections in District 2, stated that he felt Plaintiff was less qualified than the two men hired for the PPO positions. He further states that he was bothered with Plaintiff's resume which listed his job title at the North Central Correctional Facility as Correctional Officer/ Counselor. Mr. Borst stated that in his opinion that was enough to take Plaintiff out of consideration for the PPO positions.

Plaintiff states that at present only one racial minority is employed by the Department in District 2. He argues that this is an indication that the Department is discriminatory in its hiring practices. The Department states that over the years there have been many racial minorities hired by the Department and nothing in their hiring practices is discriminatory or presents a disparate impact upon minorities.

From the testimony, this Court was left with the impression that Plaintiff was not serious about the R.A. position. He showed up early for the interview and demanded that the interviewers adapt to his schedule and not he to theirs. He was described as short and abrupt in his responses to the interview by the interviewers. He was asked to complete portions of the application, but stated he did not have the time and would return later. The materials were set out with note that Plaintiff would return to complete them, but they were not completed. This Court believes that Plaintiff did not return to complete the application even though Plaintiff claims that he did.

Conclusions

(Disparate Treatment)

Defendants acknowledge that Plaintiff has presented a prima facie case under ***McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed2d 668 (1973)**.

1. Plaintiff belongs to a protected class;
2. Plaintiff was qualified for a job for which Defendants were seeking applicants;
3. That despite being qualified, Plaintiff was rejected; and
4. Defendants hired persons not in Plaintiff's protected class.

Once a prima facie case has been presented the burden then shifts to the Defendants to articulate some legitimate, nondiscriminatory reason for the Plaintiff's rejection. ***McDonnell Douglas Corp. v. Green*, L.Ed. At 678.**

Here, the Defendants argue that Plaintiff's rejection for the PPO positions was due to more qualified applicants. This Court agrees. Both Mr. Martin and Mr. Goebel have equal the education of Plaintiff, and they had years of community based correction experience which Plaintiff did not. Plaintiff's argument that other PPO's have been hired without community based corrections experience misses the mark. This Court does not know what the competition was in those situations. In this case Plaintiff just had the misfortune of competing for a job with more qualified applicants.

This Court finds that Defendant's rejection of the Plaintiff for the PPO positions was based on legitimate, nondiscriminatory reason. In regard to the R.A. position this Court finds that Plaintiff removed himself from consideration by his actions and failure to complete the application process. If Plaintiff had professionally pursued the R.A. position and had been rejected in favor of an individual with less qualifications, the findings of this Court would have been much different.

(Disparate Impact)

Plaintiff argues that the Defendant's hiring policies appear to be facially-neutral, but in fact result in disparate impact to racial minorities. The policies of which Plaintiff complains include the Department's unwritten preference for people with community based corrections experience, the use of an Application Screening Criteria which does not take into consideration an applicant's community involvement, the elimination of an entry level PPO I position, requiring signed blank application forms

from outside applicants but not insiders, and failing to check references. Plaintiff maintains that by employing these hiring practices the Department was able to narrow the field of applicants to five or eight with the odds for a qualified minority making the cut slim to none.

Here, employing the Defendant's hiring practices, Plaintiff made the cut three out of four times. This Court does not find that the hiring practices of Defendant's operate to execute a disproportionate number of members of a protected class. ***Griggs v. Duke Power Company*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971)**, or that the challenged practices do not serve, in a significant way, the legitimate employment goals of the Defendants. ***Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659, 104 L.Ed.2d 733, 752, 109 S.Ct. 2115 (1989).**

Plaintiff regards as proof of the disparate impact of Defendant's practices the fact that so few minorities are currently employed in District 2. The United States Supreme Court has noted, however, that a plaintiff cannot simply rely on statistical disparities in an employer's work force. The plaintiff must also show a causal relationship between the challenged practices and the statistical disparity. ***Wards Cove Packing Co. v. Antonio*, L.Ed. At 751.** Plaintiff makes no causal connection in this case.

ORDER

IT IS HEREBY ORDERED that Plaintiff's claim against the Defendant is dismissed with costs assessed to Plaintiff.

Dated this 12th day of December, 1997.

/s/ Kurt L. Wilke, Judge,
Second Judicial District

In The Supreme Court of Iowa

No. 98-89

Webster County No. C4278-0995

Filed October 29, 1999

ORDER

Timothy Madai Taylor,
Plaintiff-Appellant,
vs.
State of Iowa,
Defendant-Appellee.

On review from the Iowa Court of Appeals

Appeal from the Supreme Court of Iowa, Arthur A. McGiverin, Judge.

After consideration by this court en banc, further review of the above captioned case is denied.

Dated this 29th day of October, 1999.

The Supreme Court of Iowa
by /s/ Arthur A. McGiverin, Chief Justice

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 98-0089
COURT OF APPEALS NO. 9-157

TIMOTHY MADAI TAYLOR,

APPELLANT,

vs.

STATE OF IOWA,

APPELLEE.

APPEAL FROM THE IOWA DISTRICT COURT FOR
WEBSTER COUNTY
HONORABLE KURT L. WILKE

PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER REVIEW

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APPLICATION FOR FURTHER REVIEW AND STATEMENT OF GROUNDS FOR REVIEW

COMES NOW Appellant, Timothy Madai Taylor, and for his Application for Further Review, states this case presents: a) unique questions of first impression in the

allocation of burdens of proof in a civil rights claim involving state hiring practices; b) errors of law and findings of fact lacking substantial support; and c) a decision which perpetuates institutional racism, conflicting with federal law and prior holdings in the following respects:

1. Both the Court of Appeals and the trial judge erroneously placed the burden of persuasion under the disparate impact theory on the complainant in all stages of proof, contrary to Title VII, 42 U.S.C. §2000e-2K(1)(A), (b), and (C). (Ct. of App. Op. p. 17) The 1991 Amendments to Title VII legislatively overruled *Wards Cove Packing Co. v. Antonio* [sic], 490 U.S. 642, 656, 109 S. Ct. 2115, 2124, 104 L. Ed. 2d 733, 751 (1989) and portions of *Hy Vee Food Stores v. ICRC*, 453 N.W.2d 512, 519 (Iowa 1990). Subsection 105K(1)(A)(i) (cited in Appellant's Reply Brief p. 5) imposed the burdens of production and persuasion on the State to prove that a challenged employment action having a disparate impact on a protected class "is job related for the position in question and consistent with business necessity." By a preponderance of evidence, Appellant established disparate impact, demonstrating the decision-making process violated the State's written hiring policies and that the State's "alternative employment practice" was simple: ***compliance*** with its own hiring manual and Affirmative Action Plan. (1993) 42 U.S.C. §2000e-2(K)(1)(A)(ii). The State of Iowa faced a compelling business necessity: compliance with the Equality in the Courts Task Force recommendations. (Exh. 9C)

2. The Court of Appeals and trial judge erroneously required Appellant to disprove employer's naked assertions of "best qualified" under a disparate impact analysis and to prove the impossible: that a specific practice caused a specific statistical, racial disparity, when the State failed to collect relevant statistics on race in hiring in 1993, beyond what Appellant offered at trial. Federal law placed the burden on the employer to keep statistical data of racial impact. 29 CFR §1607.4D (1993); 42 AM. JUR 2d *Job Discrimination* §§392 and 393 (1993) in its absence, a rebuttable presumption of discrimination arose.

3. The lower courts erroneously upheld the State's "best qualified" decision-making/preferential hiring practice as "sufficient to rebut" Appellant's prima facie case of race discrimination under both disparate treatment and disparate impact theories, contrary to federal law and the preponderance of evidence. Subjective standards are inherently suspect, and should have carried little weight in meeting the State's burden. *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975)

4. The appellate court and trial judge erred in relying on the State's subjective criteria and one-sided application/screening requirements to shift the burden under the disparate treatment theory; the State's reasons for Appellant's rejections lack credibility as a matter of law.

5. Appellant retains his right to reassert each and every issue preserved below for appeal, including fact findings unsupported by substantial evidence.

WHEREFORE, Appellant PRAYS for further review, reversal, and remand of this case.

/s/ Jeane W. Pearson
Jeane W. Pearson, WE0009417
ATTORNEY FOR
PLAINTIFF-APPELLANT

Supreme Court, U.S.
FILED
FEB 7 2000
CLERK

(2)

No. 99-1269

In The

Supreme Court of the United States

TIMOTHY MADAI TAYLOR,

Petitioner,

v.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER AMENDMENTS TO FEDERAL LAW ARE BINDING ON QUESTIONS OF STATE LAW WHEN THERE IS NO FEDERAL QUESTION PRESENT?

II. SPECIFICALLY, IS AN ANALYSIS BY STATE COURTS OF THE STATE LAW DEFINITION OF DISPARATE TREATMENT AND DISPARATE IMPACT AFFECTED BY AN AMENDMENT TO A FEDERAL STATUTE?

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STATEMENT OF THE CASE

In 1993, Taylor, a 42-year-old African American, was unsuccessful on four different attempts to secure various positions with the Second Judicial District Department of Correctional Services of Iowa (Department). Taylor was one applicant for a position as a PPOII (Probation and Parole Officer, level II) out of 161 other candidates in April of 1993, and was not chosen as one of the top five to be interviewed for the position. In August of 1993, Taylor then applied for a position as a PPOIII and was interviewed, but not hired. Again in September, 1993, Taylor applied for a PPOII position, was interviewed, and not hired. In October of 1993, Taylor also applied for a position as an RA (Residential Advisor), but failed to complete the application process. The State conceded that Taylor was qualified for all four positions, but asserted that more qualified candidates were hired for the three PPO positions and his failure to complete the RA application prevented his consideration.

Taylor alleged both disparate treatment and disparate impact claims based *only* on Iowa Code § 216.6 (1993), Iowa's state law analogue to Title VII (42 U.S.C. § 2000e et seq.) He did not allege Title VII violations. (Petitioner's Appendix 2a) Legitimate, non-discriminatory reasons offered by the Department (the hiring of more qualified candidates) led the trial court to dismiss the disparate treatment claim. The absence of a causal relationship between the challenged employment decisions and the alleged statistical disparities in the Department's workforce led the trial court to dismiss the

disparate impact claim. The dismissals were affirmed at the state appellate and Supreme Court level.

SUMMARY OF THE ARGUMENT

The Iowa District Court, the Iowa Court of Appeals, and the Iowa Supreme Court interpreted the state Civil Rights Act (Iowa Code chapter 216) and determined that Taylor could not recover on his claim, alleging discrimination on account of his race. Federal analysis of Title VII and the 1991 Amendments to that Title, is unnecessary because there was no Title VII claim made. Even if the 1991 amendment to Title VII overrules *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), by shifting both the burden of production and the burden of proof to the employer to show that a challenged employment practice is job related and consistent with business necessity, the amendment applied only to the federal Title VII.

REASONS FOR DENYING THE WRIT

I. THERE IS NO FEDERAL QUESTION PRESENTED AS REQUIRED BY RULE 10(c). IOWA'S COURTS INTERPRETED STATE LAW ONLY.

The Iowa Supreme Court correctly affirmed the lower courts' acceptance of the state's business justification under *Ward's Cove*, without reference to the 1991 Amendments to Title VII. Although the Supreme Court of Iowa gives "federal decisions deference and consideration, absent federal constitutional issues, the Supreme Court of

Iowa has the final say in interpreting Iowa statutes." *Pearson v. Robinson*, 318 N.W.2d 188 (Iowa 1982). The Iowa Supreme Court again followed *Hubbard v. State*, 163 N.W.2d 904, 909 (Iowa 1969): "Although decisions and interpretations of federal courts may be illustrative to state courts construing statutes patterned after those enacted by Congress and are entitled to great weight, they are neither conclusive *nor compulsory*". (emphasis added) "When there is no federal question involved, the Supreme Court of Iowa has the final say." *Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Iowa 1974). "The mere reference to a federal statute in a pleading will not convert a state law claim into a federal cause of action if the federal statute is not a necessary element of the state law claim, and no preemption exists." *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 345-47 (9th Cir. 1996). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 809 n. 6, 106 S.Ct. 3229, 3233 n. 6, 92 L.Ed.2d 650 (1986).

Taylor based his discrimination claims on Iowa Code chapter 216, Iowa's Civil Rights statute. The Iowa Supreme Court may, and often does, consider federal law when interpreting a state statute, but has no obligation to do so. The 1991 Amendments are not controlling on the interpretation of state law.

II. THE DISPARATE IMPACT CLAIM WAS APPROPRIATELY DISMISSED, UNDER THE FACTS FOUND BY THE TRIAL COURT.

In Iowa, "[a] plaintiff in a civil rights action has the burden of establishing a prima facie case of discrimination." *Iowa Civil Rights Comm. v. Woodbury County Community Action* Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981). "Discrimination may be shown by either disparate impact or disparate treatment." *Id.* "The standards for disparate treatment claims are based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), while the standards for disparate impact claims stem from *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)." *Id.* at 443. These principles as to allocation of the order of presentation and burden of proof were followed here as well. (Petitioner's App. 5a, 7a)

In Iowa, the first stage of a disparate impact claim requires the employee show that a particular employment practice has an adverse impact on a protected group in "marked disproportion to its impact on employees outside the group." *HyVee Food Stores v. Civil Rights Comm'n*, 453 N.W.2d 512, 517 (Iowa 1990). "The statistical comparison must be valid in terms of significance, scope and time." *Id.* The petitioner is then "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Dubuque City Assessor's Office v. Dubuque Human Rights Comm.*, 484 N.W.2d 200, 203 (Iowa Ct. App. 1992), quoting *Ward's Cove*, 490 U.S. at 656. In Iowa, "[T]he burden of persuasion in a disparate impact case now rests with the employee in all three stages of proof." *HyVee*, at

518-19. This analytical framework was reaffirmed here. (Petitioner's Appendix 6a.)

Under the *Ward's Cove* analysis, the sole burden on the Department was the burden of production. Trial court found that was successfully met. Under the facts found by the trial court the claims were properly dismissed.

III. THE DISPARATE TREATMENT CLAIM WAS APPROPRIATELY DISMISSED, UNDER THE FACTS FOUND BY THE TRIAL COURT.

"Disparate treatment occurs where members of a majority have been denied the same employment, promotion, or transfer opportunities as have been made available to other employees." *Mowry v. Iowa Civil Rights Commission*, 424 N.W.2d 764 (Iowa Ct. App. 1988). "The disparate treatment theory focuses on the employer's motivation." *HyVee*, at 516. "In a claim of disparate treatment in employment, proof of the employer's motive is critical." *Id.* In a disparate treatment claim the employee seeks to show individual discrimination on the basis of race, color, religion, sex or national origin. *Id.* "The employee must establish a prima facie case of intentional discrimination by a preponderance of the evidence." *Dubuque City Assessor's Office v. Dubuque Human Rights Commission*, 484 N.W.2d 200, 202 (Iowa Ct. App. 1992).

Even though Taylor has presented a prima facie case, the district court concluded, "rejection of the plaintiff for the PPO positions was based on a legitimate, non-discriminatory reason." (Petitioner's Appendix 8a) The Department hired "more qualified applicants" and the trial court reviewing those qualifications, "agreed".

IV. PETITIONER FAILED TO PRESERVE ERROR IN HIS DISPARATE TREATMENT CLAIM.

"Issues must ordinarily be presented to and passed upon by trial court before they may be raised and decided on appeal." *State Farm Mut. Auto Ins. Co. v. Pfibben*, 350 N.W.2d 202, 206 (Iowa 1984). "If no Rule 179(b) motion (post-trial) is made, or an issue not raised, the court will assume as fact an unstated finding necessary to support the trial court's judgment." *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1993) (parenthetical added).

If Taylor felt there was any error in the analysis of his disparate treatment claim, it was his obligation to raise it before the district court. Taylor's failure to do so resulted in a failure to preserve the error under state law making it non-justiciable on review. (Petitioner's Appendix 8a)

CONCLUSION

For the reasons set forth, the Petition should be denied.

Respectfully submitted,

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